82-6560

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM 1983

* * * * * * * * * * * * * * * *

BILLY JOE MAGWOOD,

PETITIONER,

V.

STATE OF ALABAMA

DEFENDANT,

* * * * * * * * * * * * * * * *

RECEIVED
APR 16 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
APR 12 1983
Alexander L. Stevas, Clerk

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
STATE OF ALABAMA

The petitioner, Billy Joe Magwood, prays that a writ of Certiorari issue to review the opinion and judgment of the Supreme Court of Alabama rendered in these proceedings on January 7, 1983.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama, is yet unreported, appears at Appendix A, p. 19 . The opinion of the Court of Criminal Appeals of Alabama is unreported, but appears at Appendix A, p. 25 , and, the opinion of the Circuit Court of Coffee County is unreported, but appears at Appendix A, p. 42 .

JURISDICTION

The judgment of the Supreme Court of Alabama was entered January 7, 1983. Petitioner applied for a rehearing on January 21, 1983 and same was denied on February 11, 1983. This petition for certiorari was filed less than ninety (90) days from the date petitioner's

petition for rehearing was denied. The jurisdiction of this Court is invoked under 28 U.S. C. §1257(3).

STATEMENT OF FACTS

The alleged facts presented at a trial of this matter shows that Billy Joe Magwood shot and killed Sheriff Neil Grantham, within a few weeks of his release from a State prison facility where he was serving a four year term for possession and distribution of a controlled substance. Billy Joe Magwood came up for parole in October 1978 before the Parole Board but was denied on the basis that "His release would not be compatible with the welfare and protection of society."

Prior to his release, Magwood's probation was revoked on the possession and distribution charge after he was charged with assault and battery and threatening his probation officer.

The record shows that Magwood pulled up in front of the Coffee County jail on March 1, 1979 between 6:00 A.M. and 6:30 A.M. He parked the automobile he drove in the parking space alloted for the sheriff.

Sheriff Neil Grantham arrived between 6:30 A.M. and 6:45 A.M. He parked his car across the street from the jail, went to a trash can and deposited a trash bag therein, came back across the street behind the parked car of Billy Joe Magwood.

Magwood got out of his car, walked to the rear of the car and shot the sheriff three times. Sheriff Niel Grantham fell to the ground. Tom Weeks, a deputy sheriff was an eye witness to the shooting. Weeks was standing in the doorway of the jail looking out of the windows. After hearing the shots and seeing Sheriff

Grantham fall, Weeks went to a desk draw, retrieved a pistol and attempted to apprehend Magwood.

Magwood fired at least two shots at deputy Weeks, got in the automobile in which he arrived and drove off.

A short time thereafter, City, County and State officers arrested Billy Joe Magwood after locating him sitting on the back porch of his mother's house. The car he drove to the jail, a faded blue Chevrolet, was parked out front.

STATEMENT OF THE CASE

On March 1, 1979, Billy Joe Magwood was arrested for the murder of Sheriff Neil Grantham of Coffee County.

On March 12, 1979, Billy Joe Magwood was indicted for murder.

On May 5, 1981, Billy Joe Magwood was arraigned and pleaded guilty by reason of insanity and not guilty.

On June 1, 1981, the case came to trial.

On June 2, 1981, Billy Joe Magwood was found guilty.

On June 20, 1981, Billy Joe Magwood was sentenced to death by electrocution to occur August 4, 1981.

On July 20, 1981, a motion for new trial was filed and denied on September 16, 1981.

Notice of appeal was filed September 24, 1981.

On February 16, 1982, the case was submitted to the Court of Criminal Appeals.

On April 5, 1981 oral argument was waived and the case was submitted on briefs.

On May 18, 1982, the Court of Criminal Appeals affirmed the trial Court's decision.

On May 28, 1982, application for rehearing was filed in the Court of Criminal Appeals.

The application for rehearing was denied on June 8, 1982.

Writ of Certiorari and accompanying brief filed on June 22, 1982.

On August 19, 1982, Petition for Writ of Certiorari was granted.

On January 7, 1983, State Supreme Court rendered its decision affirming the Court of Criminal Appeals.

On January 21, 1983, Application for Rehearing was filed.

On February 11, 1983, application was denied.

QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT PETITIONER'S MOTION FOR CHANGE OF VENUE?

II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN SUBMITTING THIS CASE TO THE JURY IN THE FACE OF OVERWHELMING EVIDENCE INTRODUCED BY DEFENDANT TO REBUT THE PRESUMPTION OF SANITY?

III. WHETHER THE COURT ABUSED ITS DISCRETION BY DENYING PETITIONER'S REQUEST TO HIRE A PSYCHIATRIST AFTER THE STATE SECURED THE OPINION OF AN ADDITIONAL PSYCHOLOGIST?

IV. WHETHER THE DEATH STATUTE UNDER WHICH DEFENDANT WAS TRIED AND CONVICTED IS CONSTITUTIONAL?

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT PETITIONER'S MOTION FOR CHANGE OF VENUE?

We realize that a motion for change of venue is within the sound discretion of the trial court, and absent a showing of abuse of that discretion, its ruling will not be disturbed. Those words are supported by a line of cases, Speigner v. State, 367 So.2d 590; Coan v. State, 380 So.2d 980; Dolvin v. State, 391 So.2d 666. And, on its face those words seem fair and logical, but how does one gage a judge's discretion? Is the fact that every television station, radio station and newspaper in the area and surrounding area reported the fact that Billy Joe Magwood shot and killed Sheriff Neil Grantham sufficient to warrant an abuse of discretion? Is the fact that periodically for a period of nearly two years, these same news services diligently reported the incident to the public without also reporting that petitioner Magwood was innocent until proven guilty, dispositive of the issue? Is it the judge's duty to take these circumstances into consideration and how perpetual reporting, that a black ex-convict shot and killed the local sheriff is likely to effect potential jurors? Should the fact that petitioner Magwood could not be housed in a Coffee County jail for nearly two years after the killing for fear of his safety be considered by the trial judge in deciding venue? We think so. The record of this trial is filled with news reports of the killing. The sensationalism, surrounding this trial mixed with the traditional racial overtones present when a black kills a white, not to mention a black (ex-convict) killing the local sheriff. The courtroom was packed with friends of the sheriff. Extra precaution had to be taken for security throughout the trial. Certainly, to hold

petitioner's trial in the midst of this atmosphere was an abuse of the judges discretion. In making the claim of abuse of discretion, we do not overlook Irvin v. Dowd, 366 U.S. 717, 81 S. Ct. 1639, 6 L.Ed. 2d. 751, but state that the highly pressured conditions under which this trial was held in a small rural Alabama county where virtually everyone knows everyone else distinguished Irvin v. Dowd, supra, and makes the jurors assurances that they can place aside their biases more than suspect, but critical. Murphy v. Florida, 421 U. S. 794, 95 S. Ct. 2031, 44 L.Ed. 2d 589. A change of venue would have remedied the situation and removed any and all doubt, especially since petitioner's life hangs in the balance.

II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN SUBMITTING THIS CASE TO THE JURY IN THE FACE OF OVERWHELMING EVIDENCE INTRODUCED BY DEFENDANT TO REBUT THE PRESUMPTION OF SANITY?

Defendant in this case presented the defense of not guilty and not guilty by insanity. By presenting said plea, defendant had the burden of rebutting the presumption of sanity. Herbert v. State, 357 So.2d. 683 (Ala. CR. App.). Billy Joe Magwood, defendant, is charged with the murder of Sheriff Neil Grantham of Coffee County on March 1, 1979.

Apprehended within hours after shooting the sheriff, defendant, Billy Joe Magwood was transferred to a neighboring county for safety. In the mean time his trial counsel requested that Magwood be tested in order to determine his sanity. On May 31, 1979, the Court appointed two local general practitioners, Dr. Donald Crook and Dr. Bancroft Cooper to examine the defendant. After fifteen to thirty minutes of examination on two separate occasions each doctor stated that defendant was sane (T-236 & 272).

However, both doctors on cross examination stated that they knew nothing of defendant's prior medical or mental history. Each doctor refused to rate their cursory diagnosis superior to the diagnosis of the Lunacy Commission appointed later (T-238, T-275).

Defendant's counsel not being satisfied with the results of the examinations given his client by the two general practitioners requested a covening of a Commission on Lunacy in order to determine defendant's mental responsibility under Article 22, Chapter 16, Title 15, Code of Alabama.

Said Lunacy Commission was duly provided in accordance with Title 15-16-22 Code of Alabama. Billy Joe Magwood was transferred to the custody of the Supreintendent of Searcy Hospital, Mt. Vernon, Alabama for observation (T-383). J. E. Kimbrough, M. D., Assistant Superintendant, Clinical Services, William H. Rudden, M. D., Staff Psychiatrist, and A. Ronald Walker, M. D., Staff Psychiatrist were appointed to constitute the commission.

There is no need to quote from their report here. It is part of the record located at T. 384 to 386. The report speaks for itself. After hours and hours of examination and evaluation the commission individually and jointly found defendant Magwood to be presently insane and incompetent on the day said crime was committed.

This report was submitted to the Clerk of the Coffee County Court on August 16, 1979. These doctors only a few months after the alleged commission of this crime by Magwood found him to be totally crazy. The precise psychiatric examination are located at T. 355 to 567. Through the reports, defendant Magwood is listed as a schizophrenia, paranoid type, violent, with capabilities of "acting out" his fantasies.

At trial of this matter, attorney for defendant, Magwood, called Dr. William Rudder, one of the participants on the Lunacy Commission who was not present but h i s deposition was read into the record, repeated over and over that defendant Magwood was out of touch with reality, had a diseased mind, and that defendant was incapable of distinguishing between right and wrong (T. 199). The record further reflects defendant had a history of drug abuse, utilizing such drugs as LSD, cocaine, heroine, opium, gualudes, valium and marijuana (T.557). Treatment while under the custody of the Lunacy Commission included loxitane, novane, taractan and lellurial. All are potent drugs to treat psychosis (T. 245).

Dr. Rudder further stated that defendant Billy Joe Magwood's mental illness is severe, so severe that he would be diagnosed insance in any part of the world. In response to the prosecution's question "People who have schizophrenia and people who have schizophrenia paranoid type, they don't behave all alike in all respect, do they?

> "Out of a given number of people, let's take a hundred, for example, who are suspected of having schizophrenia, there will be upwards to fifty to seventy-five percent of those that anybody would say has schizophrenia. There will be ten or fiften of twenty percent, depending on the part of the world you're in, that there would be--some people would say they were perfectly all right. There will be some borderline people which would lead you to believe, if you write up the statistics on these borderline people, that we don't know what we're talking about and we can't decide who's crazy and who ain't crazy, just in street terms.
>
> Now, I want to go ahead.
>
> Billy Joe Magwood falls into the category that would be called cracy in Stockholm; he would be called crzay in Calcutta, in Tokyo, any place. He is schizophrenic. He is not in the borderline category."

Prior to his trial on June 2, 1981, defendant was required by the State to submit to examination by Dr. Douglas McKeown, a licensed clinical psychologist. Between April 23 and April 27, 1981, at the Houston County Jail in Dothan, Dr. McKeown, examined defendant from eight to ten hours. It was Dr. McKeown's opinion that defendant was sane and knew the difference between right and wrong on March 1, 1979, the date of the shooting. Dr. McKeown readily admitted that he never examined or observed defendant at any time when defendant was not taking his proper medication.

In order to rebut the presumption of sanity, one's evidence must be overwhelming, Boyle v. State, 229 Ala. 212, 154, So. 575; Christian v. State, 351 So.2d 623; Noris v. State, 401 So.2d 191. Both general practitioners who examined defendant only a few days after the shooting refused to state that he was sane. One docter deferred to the expertise and opinion of the Lunacy Commission, and the other stated that in his opinion defendant was sane but suffered from the mental disorder paranoid schizophrenia, the same condition upon which the Lunacy Commission found defendant to be insane and incompetent to stand trial.

The Lunacy Commission's report speaks for itself. Furthermore, it was an extensive report made within three months after the incident. That commission's report found defendant insane presently and insane on the date the crime was committed. The only other test administered to defendant regarding his competency to stand trial and his competency on the day the crime occurred over two years later after extensive medical treatment. The clinical psychologist who made the report, Douglas McKeown, stated that he had never examined the defendant when the defendant was not on medication.

This Honorable Court need not be reminded that defendant had been in jail and on no medication when the first two general practitioners saw him a few days after the shooting. Their examination was simply inadequate and they were not qualified in the field of mental disorders to render such an opinion. This Court need not be reminded that the Lunacy Commission was composed of three very qualified psychiatrists who overwhelmingly pronounded defendant insane. Finally, this court need not be reminded that Dr. McKeown's opinion was based upon his examination of a completely different Billy Joe Magwood, some two years after the incident and some two years of extensive medical treatment.

We think here, that if this Court apply the principles of law which are outlines in Christian v. State, supra, and its progeny to the facts in this case, this Court will find that overwhelming and uncontradicted evidence was present and sufficient to rebut the presumption of sanity.

III. WHETHER THE COURT ABUSED ITS DISCRETION BY DENYING PETITIONER'S REQUEST TO HIRE A PSYCHIATRIST OR PSYCHOLOGIST AFTER THE STATE SECURED THE OPINION OF AN ADDITIONAL PSYCHOLOGIST?

The State hired Dr. Donald Crook and Dr. Bancroft Cooper to examine defendant in order to determine his sanity on May 31, 1979. Defendant had no choice in the selection of said doctors.

Both doctors returned a finding that defendant was sane. These examinations took place in the jail for a period of twenty to thirty minutes each. On the 20th day of June 1979, the State convened a Lunacy Commission which conducted extensive examinations of defendant and found him to be insane presently and insane at the time the

offense was committed. Being unsatisfied with the result of the Lunacy Commission, the State went even further to employ the assistance of Dr. Douglas McKeown, a clinical psychologist, in order to have defendant examined two years after the alleged offense occurred. Dr. McKeown stated that it was his professional opinion that defendant was sane.

Defendant's counsel filed a motion on June 26, 1980 in order to secure the services of a consultant psychologist to assist in his defense. Said motion was denied.

Because he is indigent and unable to secure the services of a consultant psychiatrist, defendant had to proceed to trial unassisted whereas the State with its limitless funds did so hire a psychologist to assist in the prosecution of defendant. Such conduct by the State violates defendant's Constitutional right to equal protection under the law of both the State and Federal Constitution.

Herein lies the crux of petitioner's claim of unequal protection. The State sought and secured the services of a clinical psychologist over two years after the shooting and after petitioner had been treated extensively with drugs. In fact, the State requested its hand picked clinical psychologist to examine what amounts to a different individual.

The State's action in securing an examination of petitioner by Dr. Douglas McKeown, circumvents the mandate of Code of Alabama, 15-16-22 by, in fact, utilizing Dr. McKeown's testimony as the testimony of a second Lunacy Commission. Surely, the State would not have sought such additional testimony had the Lunacy Commission found petitioner sane.

The effects of Dr. McKeown's testimony had tremendous effects with the jurors since the testimony of both doctors who examined petitioner was favorable with one doctor deferring his opinion to that of the Lunacy Commission and the other doctor admitting that petitioner suffered from paranoid schizophrenia. The Lunacy Commission itself stated that petitioner was insane. Therefore, Dr. McKeown's testimony was the deciding material proof. Especially, since Dr. Rudder of the Lunacy Commission was not present and only his testimony was read.

Because petitioner was indigent and unable to secure the services of a clinical psychologist or psychiatrist, he was forced to proceed to trial unassisted whereas the State with the limitless funds did so hire a psychologist to assist in the prosecution of defendant. Such conduct by the State violates defendant's Constitutional rights to equal protection under the law of both the State and Federal Constitution.

Although Harris v. State, 352 So.2d 479, and Johnson v. State, 355 So.2d 663, hold:

> It has been repeatedly held that a denial of funds to pay defense experts for investigations and the assistance of experts does not amount to a deprivation of Constitutional rights.

We think the present case is distinguishable. Petitioner did not request funds to hire an expert initially. Only after the State waited two years, and only after extensive medical treatment with drugs, only after the State sought a re-evaluation of petitioner which tended to state what his mental condition was two years prior without medication, did petitioner seek additional funds to secure the services of an expert. These circumstances distinguishes the

the posture of petitioner's case from other cases cited. Petitioner should have been allowed funds to secure a psychologist or psychiatrist or the State, pursuant to the previously cited statute, should have convened a second Lunacy Commission to order an opinion on petitioner. Taking into consideration that petitioner had been on extensive medical treatment for two years since the incident.

IV. WHETHER THE DEATH STATUTE UNDER WHICH DEFENDANT WAS TRIED AND CONVICTED IS CONSTITUTIONAL?

Petitioner committed the alleged crime for which he has been tried and convicted under Alabama's Criminal Law Punishment Statute, 13-11-1 et. seq., which the United States Supreme Court found to be patently unconstitutional as a whole. Beck v. State, 100 S. Ct. 2382, 447 U. S. 625, 65 L. Ed. 2d. 392.

On remand the State Court of Alabama sought to resurrect the unconstitutional parts of the Statute by severing the constitutionally infirm clauses which precluded the judge from giving an instruction on lesser indicted offenses on a capital case and which provided that a jury had to fix punishment at death if a defendant was found guilty of a capital offense. Beck V. State, 396 So.2d 645.

However, Petitioner contend that the foundation of any so-called new death statute must come from the Alabama Legislature and not through reformulatory constructions of the Court. Petitioner states that his conviction under any state scheme originating from 13-11-1 et. seq. is unconstitutional and in violation of his Six, Eight and Fourteenth Amendment constitutional rights.

CONCLUSION

Petitioner requests this Honorable Court to grant a Writ of Certiorari and review, reverse and remand his conviction on the grounds that his constitutional rights under the Sixth, Eighth and Fourteenth Amendment have been violated.

Respectfully submitted,

CHESTNUT, SANDERS, SANDERS & TURNER

BY: _____
ATTORNEY FOR PETITIONER

Post Office Box 1305
Selma, Alabama 36702-1305

CERTIFICATE OF SERVICE

This is to certify that I have served counsel for the opposing party with a copy of the within and foregoing Petition by depositing a copy of the same in the U. S. Mail, properly addressed with postage prepaid.

This the 12th day of April, 1983.

_____
OF COUNSEL

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CODE OF ALABAMA, Title 15-16-22

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Appendix "A"

MAILING ADDRESS:
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OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

TELEPHONE: 832-6400

RECEIVED
FEB 15 1983
Chestnut, Sanders & [illegible]

February 11, 1983

Re: 81-792
Ex Parte: Billy Joe Magwood
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Billy Joe Magwood vs. State of Alabama)

Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

_____ Appell_____ granted 7 additional days to file briefs to and including

_____ Appellant(s) granted 7 additional days to file reply briefs to and including

_____ Record on Appeal filed

_____ Appendix Filed

_____ Submitted on Briefs

_____ Petition for Writ of Certiorari denied. No opinion.

XXXXXX Application for rehearing overruled. No opinion written on rehearing.

_____ Permission to file amicus curiae briefs granted

_____

2-11-83
wo

Dorothy F. Norwood

Acting Clerk, Supreme Court of Alabama

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MAR 16 1983

March 14, 1983 Chestnut, Sanders & Sanders

THE STATE OF ALABAMA - - - - - - - - - - JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1982-83

81-792

EX PARTE BILY JOE MAGWOOD

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: Billy Joe Magwood v. State of Alabama)

ORDER

Billy Joe Magwood having filed in this Court his motion for stay setting an execution date wherein he states that he intends to file a petition for writ of certiorari to the Supreme Court of the United States and seeks a stay of judgment pending disposition of the petition of writ of certiorari in the Supreme Court of the United States, and said petition for stay having been duly submitted and examined by the Court,

IT IS, THEREFORE, ORDERED that the judgment be, and the same is hereby, stayed for a period of sixty (60) days from February 11, 1983.

IT IS FURTHER ORDERED that Billy Joe Magwood, or his attorney, shall file in this Court a copy of the petition for certiorari filed in the United States Supreme Court and that unless a copy of such petition for certiorari is filed in this Court within sixty (60) days from February 11, 1983, the stay herein ordered shall automatically terminate.

IT IS FURTHER ORDERED that if Billy Joe Magwood, or his attorney, files in this Court within sixty (60) days from February 11, 1983, a copy of the petition for writ of certiorari filed in the United States Supreme Court, the stay shall remain in full force and effect pending proceedings on the writ of certiorari in the Supreme Court of the United States, or until further orders of this Court.

Torbert, C. J., and Maddox, Faulkner, Jones, Shores, and Beatty, JJ., concur. Almon, Embry, and Adams, JJ., not sitting.

I, Dorothy F. Norwood, as Acting Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 14 day of Mar 1983

Dorothy F. Norwood

Acting Clerk, Supreme Court of Alabama

AUGUST 19, 1982

THE STATE OF ALABAMA - - - - - - - - - - - - - - - - JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

WS 2

SPECIAL TERM 1982

81-792

Ex Parte: Billy Joe Magwood
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Billy Joe Magwood vs. State of Alabama)

Upon a preliminary examination of the petition in the above cause, the Court concludes there is a probability of merit in the petition and has today granted the writ.

IT IS, THEREFORE, ORDERED that the writ issue to the Court of Criminal Appeals and that this cause stand ready for submission on briefs or oral argument, if so desired, in accordance with Rule 39, Alabama Rules of Appellate Procedure.

PER CURIAM.
TORBERT, C.J., JONES, SHORES, BEATTY AND ADAMS, JJ., CONCUR.

I, Dorothy F. Norwood, as Acting Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.
Witness my hand this 19th day of August 19 82

Dorothy F. Norwood

Acting Clerk, Supreme Court of Alabama

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THE STATE OF ALABAMA - - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1982-83

Ex parte: Billy Joe Magwood

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS

(Re: Billy Joe Magwood

81-792 v.

State of Alabama)

TORBERT, CHIEF JUSTICE.

On March 1, 1979, Billy Joe Magwood, the petitioner, shot and killed Coffee County Sheriff Neil Grantham. After his arrest, Magwood was declared an indigent and counsel was appointed to represent him. The petitioner asserted he was --

not guilty by reason of insanity. On motion of petitioner's counsel, an investigation was instituted concerning the sanity of the petitioner. He was interviewed by two local physicians who testified at trial concerning his sanity. Subsequently, he was transferred to Searcy Hospital for observation and evaluation by a three-member lunacy commission. Following that evaluation, he was also interviewed by Dr. Doug McKeown, a clinical psychologist.

At trial, the defense read into evidence the deposition of Dr. William Rudder, a member of the lunacy commission, who had observed the petitioner for 8 to 10 hours over a 10-month period beginning in July 1979. Dr. Rudder stated that Magwood was a paranoid schizophrenic and in his opinion did not know right from wrong at the time of the offense. The defense offered no further evidence on the issue of insanity.

The state offered the testimony of Dr. Donald Crook, a local physician, who had known the petitioner for 12 years and who had examined him on June 6, 1979, for 30 minutes in preparation for this trial. Dr. Crook testified that petitioner exhibited no signs of schizophrenia. The state also offered the testimony of Dr. Bancroft Cooper, another local physician, who also examined the petitioner on June 6, 1979, for twenty minutes in preparation for this trial. Dr. Cooper indicated that, in his opinion, the petitioner was not insane at the time he examined him.

The evaluations of petitioner's mental condition by the State's witnesses took place in June 1979; the evaluation by the lunacy commission presented by the petitioner took place from July 1979 through April 1980. The case did not come to trial until June of 1981, approximately two years after the initial evaluations were made. In April of 1980, Magwood was removed from Searcy Hospital to the Coffee County jail.

The defense on June 26, 1980, made a motion to the court for funds to hire a psychiatrist or psychologist of the petitioner's own choosing to evaluate his sanity; that motion was denied. On April 21, 1981, the court granted a motion by the State to have the defendant examined by Dr. Doug McKeown.

Dr. McKeown testified at trial that, in his opinion, the petitioner knew the difference between right and wrong on the day Sheriff Grantham was killed.

The defendant was found guilty of the capital offense of murder. The jury recommended the death sentence; the trial court, after weighing any aggravating and mitigating circumstances, sentenced the petitioner to death. The Court of Criminal Appeals affirmed the conviction. The case is before this Court on a petition for writ of certiorari, which is granted as a matter of right in cases which impose the death penalty.

The petitioner raises several points of error for our consideration. First, petitioner asserts that it was error for the trial court to deny his motion for change of venue based on prejudicial pre-trial publicity.

Absent a showing of abuse of discretion, the ruling of the trial court on a motion for change of venue will not be disturbed. Speigner v. State, 367 So. 2d 590 (Ala. Crim. App. 1978), cert. denied, 367 So. 2d 597 (Ala. 1979). The defendant has the burden of showing that he will be unable to receive an impartial trial and an unbiased verdict at the present locale. Speigner, supra.

Absent a showing of actual prejudicial influence upon the jury, the trial court was not in error in refusing to grant a motion for change of venue. Dolvin v. State, 391 So. 2d 666 (Ala. Crim. App. 1979), aff'd, 391 So. 2d 677 (Ala. 1980). The petitioner rests his assertion of bias on his impressions of public feeling at the time of the trial.

Petitioner states in his brief, "Defendant's proof of such prejudicial influence was only displayed by the jury's verdict regarding his sanity." (Emphasis added.) Petitioner appears to contend that because the jurors found him to be sane they must have been prejudiced against him. This circuitous reasoning does not constitute a showing of actual prejudice as required by the case law.

Our review of the voir dire examination of the jurors reveals no indication of possible bias. We agree with the Court of Criminal Appeals that the publicity surrounding the crime was strictly factual in nature and was not designed to inflame the community. Further, the trial took place two years after the crime. Even if we considered the publicity prejudicial, clearly the passage of time would diminish any prejudicial effect of the media coverage. See, Speigner, supra. Thus, the Court of Criminal Appeals did not err in holding that the denial of petitioner's motion for change of venue was not in error.

The second point of error raised by petitioner is that the lower court erred in submitting the case to the jury in light of the "overwhelming and uncontradicted" evidence introduced by defendant to rebut the presumption of sanity. This issue was addressed by this Court in Christian v. State, 351 So. 2d 623 (Ala. 1977), wherein the Court established guidelines on the insanity defense. The Court reaffirmed the principle that the defendant is presumed sane and that the defendant has the burden of proof on the issue of insanity. The defendant must establish insanity by a preponderance of the evidence and the question is to be determined by the jury, except in cases where the evidence is "overwhelming and uncontradicted." Christian v. State, 351 So. 2d at 624. See also, Lee v. State, 246 Ala. 343, 20 So. 2d 471 (1945).

In the case before us, the question of insanity was

submitted to the jury, based upon conflicting testimony given by a series of four expert witnesses. Dr. Crook and Dr. Cooper, both practicing physicians, testified for the State that at the time of their examinations of the defendant in June of 1979 he was sane. Dr. Doug McKeown, a clinical psychologist who examined the petitioner in April of 1981, testified that in his opinion the defendant knew the difference between right and wrong on the day Sheriff Grantham was killed. Finally, the deposition of Dr. Rudder, a psychiatrist, was read at trial. In Dr. Rudder's opinion, Magwood was insane at the time of the killing.

We cannot say that the evidence in this case was overwhelming and uncontradicted on the issue of petitioner's claim of insanity. The trial court was not in error in submitting the question to the jury.

The third point of error raised by petitioner is that it was improper for the court to deny his request to hire a psychiatrist or psychologist of his own choosing. We hold that the claim is without merit, since we agree with the reasoning of the Court of Criminal Appeals and its conclusion that "The trial judge's actions appropriately protected appellant's rights in this regard." Magwood v. State, [Ms. May 18, 1982] __ So. 2d __ (Ala. Crim. App. 1982).

Finally, petitioner argues that the lower court did not properly weigh the aggravating and mitigating circumstances prior to imposing the death penalty. Our review of the record indicates that the court considered the capacity of the defendant, the circumstances surrounding the murder, the prior criminal activity of the defendant, his age at the time of the offense and his emotional state at the time of the offense. We hold that the trial court properly considered any aggravating and mitigating circumstances prior to imposing the death penalty.

The judgment of the Court of Criminal Appeals is affirmed.

81-792

AFFIRMED.

All Justices concur.

I, Dan Jay P. [illegible], as Acting Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the opinion and judgment as same appears of record in said court.

Witness my hand this 7 day of Jan. 1983

Dan Jay P. [illegible]

Acting Clerk, Supreme Court of Alabama

MAY 18 1982

RECEIVED
Supreme Court of Alabama

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1981-82

4 Div. 935

Billy Joe Magwood

v.

State

Appeal from Coffee Circuit Court

BARRON, JUDGE

Appellant was convicted under § 13-11-2(a)(5), Code 1975, for the murder of Coffee County Sheriff Neil Grantham. After a separate sentence hearing on aggravating and mitigating circumstances, the jury fixed the punishment at death. Subsequently, the trial court weighed the aggravating and mitigating circumstances pursuant to § 13-11-3 and § 13-11-4, Code 1975, and sentenced appellant to death. The court issued

written findings of fact which set forth the aggravating circumstances the court found sufficient to support the sentence of death.[1]

Thomas Weeks, a Coffee County Deputy Sheriff, testified he was employed as the county jailer on March 1, 1979, under Coffee County Sheriff Neil Grantham. The witness stated he observed appellant, whom he recognized as a former jail inmate, sitting in a car parked in Sheriff Grantham's parking space at approximately 6:45 a.m. Shortly before 7:00 a.m., he observed Sheriff Grantham drive up and park his vehicle. He got out of the automobile, walked to some garbage cans and deposited a trash bag, and then walked towards the jail door. Appellant got out of his automobile with something in his hand and met Sheriff Grantham at the rear of the car. At that point, Deputy Weeks heard three gunshots and saw Sheriff Grantham fall. The witness then turned back into the jail and obtained a gun. He observed appellant get back into his car and saw that he held a pistol in his hand. He exchanged fire with appellant as he drove away. Deputy Weeks then went over to where Sheriff Grantham lay on the ground and observed that the Sheriff's face was blue and that he appeared not to be breathing, having apparently been hit in the face and neck. Deputy Weeks stated he observed no one else in the area at the time the Sheriff was killed.

William Hurd testified he answered a call as a member of the Elba Rescue Squad on March 1, 1979. He observed Sheriff Grantham on the pavement in the front of the jail. They placed the Sheriff in the ambulance and transported him to the Elba General Hospital emergency room.

Dr. Bruno Santa Rossa stated he observed Sheriff Grantham at the Elba General Hospital on the morning of the shooting and, after assessing his condition, pronounced him dead upon arrival.

Dr. Richard Roper of the Alabama Department of Forensic Sciences testified he examined the body of Sheriff Grantham on

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[1]The trial court's determination of sentence, dated June 30, 1981, is hereto attached as Appendix A (Vol. 2, R. 370-372).

March 1, 1979, in Elba and found three gunshot wounds to the chest, right face, and left side of the head. In his opinion, Sheriff Grantham's death was caused by acute hemorrhage and central nervous system trauma, due to multiple gunshot wounds to the body and head. On cross-examination, he testified his notes reflected that the body exhibited a set of natural teeth. He identified a photograph of Sheriff Grantham as that of the man he examined on March 1, 1979.

Billy Ray Cooper stated he became acquainted with appellant as a fellow inmate at the Coffee County Jail in 1976. Toward the end of 1977, he heard appellant state on two or three occasions that he was being held without any reason and that he would "get even and kill that S.O.B.," referring to Sheriff Grantham. On cross-examination he was asked when this occurred. He stated it was in November, and that on the third occasion, appellant struck the jailer and tried to go downstairs to get to the Sheriff.

James Kenneth Holder, another fellow inmate of appellant's, testified he heard appellant state that they had no reason to hold him in jail, that he didn't belong there, and that he was going to get even one way or the other. The State rested at the close of Holder's testimony, and appellant's motion for acquittal, based upon the State's failure to prove a prima facie case, and motion to exclude were denied.

The appellant called Ms. Bernice Clay who stated she was the record keeper for Dr. James L. Clay. The records indicated that Dr. Clay, a dentist, had relined a set of upper and lower dentures for Sheriff Grantham in 1969.

The defense next called Dr. William H. Rudder to testify. Dr. Rudder, a psychiatrist on the staff of Searcy Hospital, did not appear. The trial court refused to issue a bench warrant for his appearance after it was learned that the Sheriff's office, in the county where Dr. Rudder was located, was closed for a legal holiday and it could not be ascertained if Dr. Rudder had actually been served with a subpoena. Appellant's counsel conceded to the trial court that by statute a member of the Searcy staff could

notbe compelled to attend court proceedings. After the court denied appellant's motion for a continuance to perfect service on Dr. Rudder, a deposition taken from Dr. Rudder was read into evidence at appellant's request in lieu of Dr. Rudder's appearing at trial.

Dr. Rudder stated in his deposition that he had examined appellant on July 3, 1979. His final diagnosis after 8 to 10 hours' observation of appellant over a period of 10 months was paranoid type schizophrenia in partial remission on medication. He stated that this was a mental disease, and in his opinion, appellant did not know right from wrong at the time of the alleged offense on March 1, 1979. Appellant was completely out of touch with reality and, in Dr. Rudder's words, would be considered "crazy" under any definition in any part of the world. At the end of the time appellant spent at the institution, he was in fairly good remission from the mental disease as a result of drug therapy. The defense rested after presenting Dr. Rudder's deposition.

The State called Dr. Donald Crook as a rebuttal witness. Dr. Crook, a medical doctor practicing in Alabama, examined appellant for 30 minutes at the request of the circuit court on June 6, 1979. He found appellant's behavior and answers were appropriate to the questions asked of him. In his opinion, appellant was sane at that time and exhibited no symptoms indicative of schizophrenia. Dr. Crook testified he was also familiar with appellant, having treated him for minor ailments on a couple of occasions from the time appellant was 15 years old.

Dr. Bancroft Cooper, a practicing physician in Elba, testified he examined appellant for 20 minutes on June 6, 1979 at the circuit court's request. In Dr. Cooper's opinion, appellant was not insane at the time he examined him.

Douglas McKeown, a licensed clinical psychologist, examined the appellant over a period of 8 to 10 hours on April 23 and April 27, 1981, at the Houston County Jail in Dothan, Alabama. Appellant's objection to the introduction of

Dr. McKeown's testimony, based upon privileged communication and equal protection, was overruled. In Dr. McKeown's opinion, appellant knew the difference between right and wrong on March 1, 1979. His diagnostic impression was, however, that appellant was suffering from paranoid schizophrenia, a disease of the mind. Dr. McKeown had never seen appellant, however, when he was not under the medication prescribed for his mental problems. The State rested at the close of Dr. McKeown's testimony and requested that the court dismiss Counts 3, 4, and 5 of the indictment. Appellant's motion to exclude the evidence as to Counts 1 and 2 for failure to prove the Sheriff was "on duty" was denied.

I

Appellant argues the jury's verdict was contrary to the law and the evidence presented, in that the jury should have returned a verdict of not guilty by reason of insanity.

In reviewing the question of insanity, the court must apply the following general principles, enumerated in Herbert v. State, 357 So.2d 683 (Ala.Cr.App.), cert. denied, 357 So.2d 690 (Ala. 1978):

> "1. By statute, there is a presumption of sanity extending to all persons over the age of 14.
>
> "2. The defense of insanity is an affirmative defense. The burden of proving this defense rests upon the defendant and never shifts to the state.
>
> "3. The burden upon the defendant is to establish the issue of legal insanity by a preponderance of the evidence and to the reasonable satisfaction of the jury.
>
> "4. The question of insanity at the time of the commission of the crime is a matter to be determined by the jury from a consideration of all the evidence.
>
> "5. In making its determination, the jury may reject all expert testimony though it is without conflict.
>
> "6. However, opinion testimony, even of experts must be weighed by the jury and may not be arbitrarily ignored."

However, where proof of insanity is both overwhelming and uncontradicted, the evidence of insanity may be so strong

and undisputed that the jury should be so instructed, and a jury verdict to the contrary must be reversed. Christian v. State, 351 So.2d 623 (Ala. 1977).

The evidence pertaining to appellant's sanity in the instant case is both extensive and contradictory. Appellant's sanity was first brought into question by a pre-trial motion by appellant's counsel requesting an investigation of appellant's sanity pursuant to § 15-16-20, Code 1975. The trial court appointed Dr. Donald Crook and Dr. Bancroft Cooper to examine the appellant. Both were medical doctors of considerable experience, but neither specialized in psychiatry. Each doctor testified at trial that, in his opinion, appellant was not insane at the time of his examination of appellant on June 6, 1979. Dr. Crook stated that based upon the short time he spent with appellant, he believe appellant was sane at that time. He also testified that he had treated appellant several times over a period of years for various complaints, and that appellant had never exhibited any symptoms of schizophrenia. He stated he would, however, defer in his opinion of appellant's sanity to a psychiatrist who had spent a considerably greater period of time observing appellant.

Dr. Cooper stated that in his opinion appellant was not insane at the time of his examination of him on June 6, 1979. He further testified that, based upon his 20 minute interview with appellant, he could not make a decision as to whether appellant was a schizophrenic, paranoid type on the day the murder occurred.

Despite the two physicians' positive view of appellant's sanity, the trial court granted appellant's motion requesting that a three-member Lunacy Commission be appointed in accordance with § 15-16-22, Code 1975. Appellant was then committed to the custody of the Superintendent of Searcy Hospital for observation by the Lunacy Commission by order dated June 20, 1979. The report of the Lunacy Commission dated August 16, 1979, which was returned to the circuit court clerk, indicated a diagnosis of schizophrenia, paranoid type and that appellant was presently

insane and incompetent. The report also stated it was the unanimous opinion of the Lunacy Commission that appellant was insane at the time of his admission to Searcy Hospital, and that appellant was probably insane and mentally incompetent at the time of the commission of the offense. (Emphasis added.) The trial court then issued an order dated August 22, 1979, ending the Lunacy Commission and retaining appellant in the custody of the superintendent of Searcy Hospital until such time as he was restored to mental competency. By letter dated April 7, 1980, the trial court was notified by Searcy Hospital that appellant was competent to stand trial, his mental illness having been placed in partial remission by medication. On April 11, 1980, the court ordered that custody of appellant be transferred to the Sheriff of Coffee County, and appellant was placed in the Houston County Jail. The report of the Lunacy Commission was introduced at trial and is present in the record. As well, the appellant introduced the deposition of Dr. William Rudder, after Dr. Rudder, for some reason, failed to respond to a subpoena to attend the trial. Dr. Rudder, a psychiatrist and member of the Lunacy Commission, testified appellant suffered from the psychosis of paranoid type schizophrenia, but that it was in partial remission under medication. In his opinion, appellant did not know right from wrong on the date Sheriff Grantham was murdered, and was completely out of touch with reality. He stated appellant was not a borderline case and would be considered "crazy" any place in the world.

Because of the time lapse between the Lunacy Commission's diagnosis of appellant and the actual date set for trial the prosecution filed a motion on April 15, 1980, requesting that appellant be examined again to determine his mental competency. After a hearing on the motion, at which appellant was represented, the court granted the motion and ordered that the appellant be examined by Dr. Douglas McKeown, a licensed clinical psychologist. Dr. McKeown was called as a rebuttal witness for the State, over appellant's objection, and testified that he examined appellant at the Houston County Jail on April 23 and 27, 1981.

He conducted a comprehensive psychological evaluation of appellant, including a psychological interview, over a period of 8 to 10 hours. In Dr. McKeown's opinion, appellant did not know the difference between right and wrong on the date the Sheriff was shot. It was also his conclusion that appellant was suffering from paranoid schizophrenia. Dr. McKeown stated that he had never observed appellant when he was not under the medication prescribed for his mental problem.

After consideration of all the testimony in this case, we do not find that the evidence of insanity was both overwhelming and uncontradicted. There was evidence presented which could have supported a reasonable inference that the homicide was an act committed by a man which the law would define as sane. Although conflicting evidence was presented by the expert witnesses who examined appellant, it is clear that the issue of whether appellant was sane or insane at the time of the offense was a question for the jury to decide. Nobis v. State, 401 So.2d 191 (Ala.Cr.App.), 401 So.2d 204 (Ala. 1981). The evidence was simply not sufficient as a matter of law to overcome the presumption of sanity and to justify reversing the jury's verdict. Graham v. State, 383 So.2d 892 (Ala.Cr.App.), cert. denied, 383 So.2d 895 (Ala. 1980).

II

Appellant asserts the trial court abused its discretion in refusing to grant his motion for a change of venue, based upon prejudicial pre-trial publicity. The record indicates a large amount of coverage was given to the sensational and notorious crime by televi ion, radio, and the printed news media. However, the vast majority of the news accounts were strictly factual in nature and did not editorialize in such a manner as to inflame the community. Coon v. State, 380 So.2d 980 (Ala.Cr.App. 1979), affirmed, 380 So.2d 990 (Ala. 1980). Additionally, much of the coverage occurred at the time of the murder, or in the months immediately following the event, with relatively little coverage occurring at the time of the trial over two years later.

The existence of widespread publicity in and of itself does not require a change of venue. Dolvin v. State, 391 So.2d 666 (Ala.Cr.App. 1979), affirmed, 391 So.2d 677 (Ala. 1980); Speigner v. State, 367 So.2d 590 (Ala.Cr.App.), cert. denied, 367 So.2d 597 (Ala. 1979). Without proof of actual prejudicial influence upon the jury, a trial court will not be found to have abused its discretion in refusing to grant a motion for a change of venue based upon pre-trial publicity. Dolvin, supra. We have reviewed the record carefully, scrutinizing both the media coverage itself, and its effect upon the jury venire as revealed by the voir dire examination of the prospective jurors. We note that any potential prejudicial effect of media coverage was diminished by the passage of time. Speigner, supra. The record contains no showing of actual prejudice such as would have rendered it reasonably unlikely that the appellant could secure a fair and impartial trial. Dolvin, supra. The following quotation from the record is representative of questions asked of each member of the jury venire by the court and appellant's counsel:

> "THE COURT: We are going to now enter upon a detailed inquiry with you, and we are going to do it in such a fashion that we will call twelve individual jurors to come and have a seat in the jury box. After you are in the box I will ask you some questions and then the counsel for each will have the opportunity to ask the questions.
>
> . . . .
>
> "Do any of you have any interest in the conviction of or the acquittal of the defendant Magwood? (No response.)
>
> "Have any of you made any promise given any person any assurance that if you were selected on the jury to try this case you will convict or you will acquit the defendant Magwood? (No positive response.)
>
> . . . .
>
> "Do any of you have a fixed opinion at this time as to the guilt or innocence of defendant Magwood which would bias your verdict? (No positive response.)
>
> "Is there any juror on this group of twelve who has a reason that you would like to express why you could not serve as a juror in this case and render a true verdict based solely upon the evidence and the law applicable to the case? (No positive response.)

"Are any of you witnesses in this case? (None.)

"Were any of you on the grand jury at the Special March Term, 1979, which returned this indictment, being on 12 March, 1979, with Bernice Winston, forewoman? (None.)

"Do any of you as jurors think that a conviction should not be had on circumstantial evidence? (None.)

"Do you as a juror have a fixed opinion against punishment by imprisonment in the penitentiary? (None.)

"Ladies and gentlemen, a possible penalty, should the defendant be found guilty, is death by electrocution. Is there any juror who has an opinion against punishment by death by electrocution? Stated another way, are any of you opposed to capital punishment? (No juror responded affirmatively.)"

"QUESTIONS BY MR. CASSADY:

"Q. Ladies and gentlemen of the jury did any of you know Neil Grantham? (Several of the twelve indicated they knew Sheriff Grantham.)

"Q. Let me ask it this way, is there anybody that did not know him? (One lady indicated she didn't.)

"Q. Were you a casual acquaintance or were you a close acquaintance, if that is a proper way to put it. (All answered casual.)

"Q. I know you have all heard about this case or either read about it? (Several indicated affirmative.)

"Q. Has what you have read or heard, has it in any way, in any way in your mind--there is nothing wrong in saying if it has--prejudiced your thinking about this case? (All negative response.)

"Q. Nothing that you have read or heard would in any way affect you to any extent in your deliberations if you served on this jury? (Negative response.)

"Q. Those of you who knew Neil Grantham I know would know one thing that he would expect whatever the circumstances that a defendant, whoever he was, or whatever he did to get a fair trial. I knew him, he was my friend, I know he would want that. Now, is there anyone of you sitting in this jury box, regardless of the circumstances, who would not give this defendant a fair trial in this case? It is important. It is important to the defendant, it is important to the State, it is important to you as human beings, and I am asking you if you will listen to this evidence that comes from this witness stand and that alone and make up your mind as to this man's innocence or guilt, and nothing but that, nothing else coming into your mind regardless. Can you all do that? (No response to the contrary.)

"MR. CASSADY: That's all I have."
(R. 98-103)

Of the entire venire, one juror answered that he had a fixed opinion as to appellant's guilt or innocence. This juror was an employee of the Coffee County Sheriff's Department which had been involved in the investigation of the Sheriff's assassination, and he was excused from serving. None of the questions of appellant's counsel concerning prejudice as a result of publicity were answered in the affirmative. Two jurors expressed an opinion of possible partiality, but stated it was based upon their long-time friendship with Sheriff Grantham, not pre-trial publicity. Both jurors were excused. The burden is upon appellant to demonstrate the actual existence of a prejudicial opinion in the mind of the jurors which will raise a presumption of partiality. Speigner, supra. The introduction of news articles alone, without more, is not sufficient evidence to justify a change of venue; their prejudicial effect must be shown. Dolvin, supra at 600; Dial v. State, 387 So.2d 871 (Ala.Cr.App. 1979), reversed on other grounds, 387 So.2d 879 (Ala. 1980).

The appellant in the instant case presented no evidence that the jurors were actually prejudiced against the appellant's case as a result of extensive publicity. Without such proof, this court could not find error in the trial court's refusal to grant a motion for change of venue. Dolvin, supra; Moberg v. State, 385 So.2d 74 (Ala.Cr.App. 1980); Coon, supra.

III

Appellant argues that both the trial court and the jury failed to properly weigh mitigating circumstances. We have examined the record and find that the trial court duly and properly charged the jury concerning mitigating circumstances. The trial judge's written finding of fact also indicates he considered and weighed any possible mitigating circumstances in appellant's favor. We find no error in that regard.

IV

The trial court's failure to grant appellant's request for funds to hire a psychiatrist or psychologist of his own

choosing is urged by appellant as reversible error. We do not agree. As has often been stated, a denial of funds to pay experts for investigations and the assistance of experts does not amount to a deprivation of constitutional rights. Thigpen v. State, 372 So.2d 385 (Ala.Cr.App.), cert. denied, 372 So.2d 387 (Ala. 1979); Brown v. State, 392 So.2d 1248 (Ala.Cr.App. 1980), cert. denied, 392 So.2d 1266 (Ala. 1981); Johnson v. State, 335 So.2d 663 (Ala.Cr.App.), cert. denied, 335 So.2d 678 (Ala. 1976), cert. denied, 429 U.S. 1026 (1976). This general rule applies equally to psychiatric experts and specialists. Nelson v. State, 405 So.2d 392 (Ala.Cr.App. 1980), reversed on other grounds, 405 So.2d 401 (Ala. 1981). Additionally, as indicated heretofore in this opinion, the trial court exhausted all available sources to assist appellant in presenting evidence in support of his insanity plea. Not one, but six experts examined appellant at the State's expense. Clark v. State, 56 Ala.App. 67, 318 So.2d 813 (1974), writ quashed, 294 Ala. 493, 318 So.2d 822 (1975), cert. denied, 423 U.S. 937 (1975). Three experts were independent, and three were State connected. Although a defendant may have some right to the appointment of an expert for preparation of his defense, there exists no constitutional right to have a private psychiatrist of the defendant's own choosing appointed at public expense. (Emphasis added.) Willie Clisby, Jr. v. State, ___So.2d___ (Ala.Cr.App. 1982), 6 Div. 576 [Ms. May 2, 1982]. The trial judge's actions appropriately protected appellant's rights in this regard.

V.

Appellant alleges the trial court erred in admitting the testimony of Doctors Crook, Cooper, and McKeown, because appellant was not advised of the right to remain silent before the interview, and because appellant's counsel was either not present at, or not informed of, the time of the interviews. Appellant contends the introduction of this expert testimony violated the privilege against self-incrimination and the right to effective assistance of counsel guaranteed under the Fifth

and Sixth Amendments to the United States Constitution. He cites Estelle v. State, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), as dispositive of this issue.

The Supreme Court held in Estelle that the use of certain psychiatric testimony at the sentencing phase of defendant's capital murder trial to establish his future dangerousness violated his Fifth Amendment rights. The court determined that where a defendant never initiated a psychiatric exam, nor ever attempted to introduce psychiatric evidence, he could not be compelled to respond to a psychiatric examination instigated sua sponte by the trial court if the statements could be used against him at trial. Hence, it was necessary in such a situation that appellant be advised of his right to remain silent and of the fact his answer could be used against him before such examination could take place. The failure to so advise the appellant rendered the psychiatrist's testimony, as to the substance of disclosures made to appellant, inadmissible at trial. The court found there would have been no Fifth Amendment violation if the psychiatrist's testimony had been limited to the question of the defendant's competency to stand trial. The court also was careful to distinguish Estelle from a fact situation involving a psychological interview occasioned by a defendant's plea of not guilty by reason of insanity at the time of the offense. To allow a defendant to remain silent, when he asserts the offense of insanity and introduces supporting psychiatric testimony, might deprive the State of its only effective measure of controverting the defendant's proof on an issue interjected into the trial by the defendant himself. Estelle, supra, and cases cited therein.

As well, the court found that the defendant's Sixth Amendment right to effective assistance of counsel was violated because the defendant's counsel was not informed in advance that the psychiatric examination would encompass the issue of future dangerousness. The defendant was thus denied the valuable assistance of his counsel in deciding whether to consent to the examination.

We find in our review of the instant case that Estelle is factually distinguishable and hence does not require reversal here. Unlike the defendant in Estelle, appellant's counsel herein first placed appellant's sanity in question by filing a motion which requested that an investigation be held into appellant's sanity, and that, upon a finding of incompetence, appellant be removed to a State hospital for the insane. Dr. Crook and Dr. Cooper were appointed in compliance with the trial court's order granting appellant's motion. Not only were appellant's counsel aware that the two doctors examined appellant, but they were the parties that requested such an examination. Additionally, the testimony of the two doctors was substantially confined by the prosecution to the question of appellant's mental competency at the time of the examination, and not at the time of the crime. Additionally, we point out that all the expert testimony objected to here came in as rebuttal testimony, after the defense rested, having presented a defense of not guilty by reason of insanity. As to Dr. McKeown, a hearing was had on the State's motion requesting a further examination of appellant's mental status after his release from Searcy Hospital. Appellant and his counsel were present at the hearing on the motion and were informed of the pending examination by Dr. McKeown. Appellant's counsel agreed to the examination, conditioned upon his receiving a copy of the report. Appellant's counsel stated for the record that the court order granting the State's motion would be in line with the motion for a mental examination appellant had previously requested. Again, Dr. McKeown's testimony was only brought in by the State on rebuttal after appellant's insanity defense was presented.

In review, we find appellant's counsel initiated the inquiry into appellant's sanity, resulting in the examination by Doctors Crook and Cooper. Appellant's counsel acquiesced in the examination by Dr. McKeown, albeit at the State's request, and stated such an examination was in partial compliance with his own motion. At arraignment, appellant pled not guilty

by reason of insanity, and at trial presented an insanity defense. The testimony of the three experts came in only on rebuttal, after appellant presented an insanity defense. Their testimony dealt with their diagnosis of appellant's mental competency at various points in time and did not deal with the substance of any incriminating information revealed to them by appellant during their examination. Appellant's counsel were informed of each examination and had every opportunity to counsel with their client. Appellant and his counsel informed Dr. McKeown that the examination would be reported to the court, and there could therefore be no expectation of confidentiality. We hold that by actively pursuing an insanity defense and introducing the deposition of Dr. Rudder as a defense witness, appellant waived any potential psychotherapist-patient privilege or privilege against self-incrimination against the subsequent testimony of Dr. McKeown on rebuttal.

> "As the Court of Criminal Appeals notes in its opinion, there are states which hold that by pleading insanity, a criminal defendant waives his statutory privilege against disclosure of a 'psychotherapist-patient communication.' The better reasoned cases hold, however, that there must be some presentation of evidence of insanity in addition to the plea, in order for the question of 'waiver' to arise...."
> Ex parte Day, 378 So.2d 1159 (Ala. 1979), at p. 1162.

To hold otherwise would be to allow appellant to call all those psychotherapists or psychiatrists, who examined appellant under State order, he desired. Then, on a claim of privilege, appellant would be able to prevent the State from calling experts who examined him for the same purpose on rebuttal to refute the appellant's defense. Ex parte Day, supra; Estelle, supra, and cases cited therein.

VI

Appellant asserts that the trial court's failure to issue a bench warrant to require Dr. Rudder to appear and testify was reversible error. Appellant introduced Dr. Rudder's deposition at trial, after his failure to appear and the trial court's refusal to command his appearance. Dr. Rudder is on the staff of Searcy State Hospital. Section 22-50-22, Code 1975, provides that

any physician of a State mental hospital may not be compelled to attend as a witness to present expert testimony in any case or any question of sanity if he certifies in writing within 10 days after receipt of a summons that his absence from the hospital would interfere with his professional duties and the welfare of his patients. A defendant who desires the testimony of the doctors may, however, depose them on all matters involving their expert opinion. This furnishes to the defendant a constitutional alternative to compulsory attendance. Seay v. State, 390 So.2d 11 (Ala. 1980), cert. denied, 449 U.S. 1134 (1980). Appellant's counsel at trial had not ascertained if Dr. Rudder had been served with the subpoena at the time he was called to testify. The trial judge contacted the local county courthouse to verify service, but was unable to receive any information because the offices were closed for a legal holiday. No certificate from Dr. Rudder of his inability to attend the trial appears in the record. Quite clearly, Dr. Rudder could not have been compelled to attend had such a certification been provided. Appellant had taken the precautionary step of deposing Dr. Rudder in advance. This deposition was in fact offered and received into evidence. Appellant's counsel did not personally verify service on his witness. He was permitted by the court to introduce Dr. Rudder's deposition, in lieu of his testimony. The trial court used every available avenue to determine if Dr. Rudder had been served, after it became apparent that appellant had failed to do so. If Dr. Rudder had been served, he could have easily refused to attend under the statute. The subpoena for Dr. Rudder was issued May 26, and the trial was on June 1 and 2. The 10 days allowed by statute for Dr. Rudder's certified response to the subpoena had not expired at the time appellant called Dr. Rudder to testify. We find no error or prejudice to the appellant in the trial court's refusal to issue the bench warrant under these circumstances. Pollard v. State, 358 So.2d 778 (Ala.Cr.App.), cert. denied, 358 So.2d 782 (Ala. 1978).

VII

Appellant argues the statute under which he was indicted is unconstitutional. This question has been resolved by the Alabama Supreme Court in Beck v. State, 396 So.2d 645 (Ala. 1981), and by our recent decision in Clisby, supra.

The Supreme Court of Alabama in Beck, supra, has indicated the standards and procedures it requires this court to follow in reviewing capital murder cases. We have closely scrutinized this case in light of those standards, and find that the crime was properly punishable by death, and that the sentence was appropriate in both its relation to the crime and to the appellant. There were no accomplices with which to compare appellant's punishment. We have searched the record for error prejudicial to the substantial rights of appellant and have found none. This case is, therefore, affirmed.

AFFIRMED.

All the Judges concur.

APPENDIX A

STATE OF ALABAMA, Plaintiff	)	IN THE CIRCUT COURT OF
	)	COFFEE COUNTY, ALABAMA
vs.	)	
	)	ELBA DIVISION
BILLY JOE MAGWOOD, Defendant	)	CASE NO. CC 79-7

On June 2, 1981, Billy Joe Magwood was found guilty of the capital felony set forth in Section 13-11-2(a)(5), Code 1975, and for the aggravated murder of Coffee County Sheriff Neil Grantham, the jury fixed the punishment at death. A hearing mandated by Sections 13-11-3 and 13-11-4, Code 1975, was held June 9, 1981, and the issue of sentence was submitted.

The court is convinced the jury took into account the circumstances of the murder together with the character and propensity of Magwood under all relevant evidence. The court concludes there was no arbitrary and capricious exercise of the power of the jury in finding guilt and fixing the punishment at death.

Magwood beyond any doubt committed the charged aggravated murder. The "aggravation" found to exist beyond all doubt is that Magwood unlawfully, intentionally, and with malice aforethought killed Coffee County Sheriff Neil Grantham by shooting him three times at close range with a pistol while Grantham was on duty and because of official job related acts as Sheriff of Coffee County, Alabama. The court does not find the existence of an aggravating circumstance in Section 13-11-6, Code 1975, other than the "aggravation" alleged in the indictment. Beck v. State, Ala., 396 So.2d 645 (1981); Kyser v. State, Ala., _____ So.2d _____ (1981). The court is required to focus on the particularized nature of the crime. The crime is particularized by the aggravation.

The matters relating to any mitigating circumstances including those enumerated in Section 13-11-7, Code 1975, have been considered. The court concludes that Magwood has no known significant prior criminal activity other than a conviction for possession of a controlled substance and his age at the time of the murder of Sheriff Grantham was twenty-seven years. These mitigating circumstances exist. The jury in the guilt phase of the trial rejected the not guilty by reason of insanity plea. The court concludes Magwood did not kill Grantham under influence of extreme

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or emotional disturbance and when the three bullets were fired into the body of Granthm, Magwood had the capacity to appreciate the criminality of his act. Magwood's conduct was contrived, calculated and previously designed with the capacity to conform his conduct to the requirements of the law.

The court has considered the relevant facets of the character and record of Billy Joe Magwood and the circumstances of the particular offense. Magwood has been considered as a uniquely individual human being and not a faceless undifferentiated person who stands convicted of a designated capital offense. The court has considered the factors of why a death sentence should be imposed and why it should not be imposed. The circumstances of aggravation and mitigation have been weighed against each other.

IT IS, THEREFORE, ORDERED AND ADJUDGED BY THE COURT AS FOLLOWS:

1. That the verdicts of the jury finding Billy Joe Magwood guilty of the capital felony and fixing the punishment at death for the murder of Coffee County Sheriff Neil Grantham are sustained by the evidence beyond a reasonable doubt.

2. That the fixing of the punishment at death by the jury was not the result of passion, prejudice or other arbitrary factor while deliberating and fixing the sentence.

3. That Billy Joe Magwood is adjudged guilty of the capital offense of the murder of Coffee County Sheriff Neil Grantham.

4. That does Billy Joe Magwood have anything to say before sentence or anything to say why the sentence of the law should not be imposed in accordance with law.

5. That the age of Magwood and no known significant prior criminal activity by him are insufficient to outweigh the unlawful, intentional and malicious killing of Coffee County Sheriff Neil Grantham by shooting him with a pistol while Grantham was on duty and because of official job related acts as Sheriff of Coffee County, Alabama.

6. That it is the judgment and sentence of the court that you, Billy Joe Magwood, for the offense of aggravated murder, be sentenced to death by electrocution on August 4, 1981, by the executioner causing to pass through the body of Billy Joe Magwood a current of electricity of such intensity to cause death, and the application and continuance of such current through your body, Billy Joe Magwood, until you are dead.

7. That execution of the sentence of death is stayed pending automatic review provided by Section 13-11-15, Code 1975, and Section 12-22-150, Code 1975.

DONE AND ORDERED this 30th day of June, 1981.

Riley Green

CIRCUIT JUDGE

Filed in open Court this the 30th day of June, 1981.

Jim Ellis
Clerk

STATE OF ALABAMA

COFFEE COUNTY

I, Jim Ellis, Clerk of the Circuit Court, Coffee County, Alabama, hereby certify that the foregoing is a true and correct copy of the original document as the same appears on record in my office.

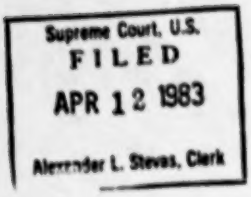
This the 14th day of July, 1981.

Jim Ellis

Jim Ellis, Circuit Clerk

IN THE SUPREME COURT OF THE UNITED STATES

TERM 1983



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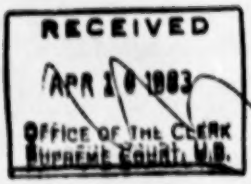


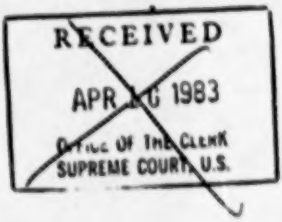
BILLY JOE MAGWOOD,

PETITIONER,

VS.

STATE OF ALABAMA,

DEFENDANT



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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Billy Joe Magwood, who is confined on death row at the Alabama State prison known as Holman Unit asks leave to file the attached petition for a Writ of Certiorari to the Alabama Supreme Court without prepayment of costs and to proceed in forma pauperis pursuant to Rule 5-B

The Petitioner's affidavit in support of this motion is attached hereto.

Respectfully submitted,

CHESTNUT, SANDERS, SANDERS & TURNER

BY: J. L. Chestnut, Jr.

J. L. Chestnut, Jr.

Post Office Box 1305

Selma, Alabama 36701

1

CERTIFICATE OF SERVICE

This is to certify that I have served counsel for the opposing party with a copy of the within and foregoing Motion by depositing a copy of the same in the United States Mail, properly addressed with postage prepaid.

This the 11th day of April, 1983.

OF COUNSEL

IN THE SUPREME COURT OF THE UNITED STATES

RECEIVED
APR 16 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

BILLY JOE MAGWOOD,

PETITIONER,

VS.

STATE OF ALABAMA,

DEFENDANT,

CASE NUMBER_____

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF ALABAMA

COUNTY OF ESCAMBIA

A F F I D A V I T

I, Billy Joe Magwood, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay cost or fees:

A. (1) I am the Petitioner in the above entitled case.

(2) Because of my poverty, I am unable to pay costs of said cause.

(3) I am unable to give security for the same.

(4) I believe that I am entitled to the redress I seek in said case.

B. The nature of said cause or case is briefly stated as follows:

"I was sentenced to death by trial judge in the Circuit Court of Coffee County, Alabama, on a capital charge of having killed the Sheriff of Coffee County.

The present proceeding was commenced on direct appeal through the Alabama State Court system. There are several points of error:

Form 4 AFFIDAVIT REQUESTED

(1) The Court denied my motion for change of venue based upon prejudicail pre-trial publicity.

(2) The case was submitted to the jury in the presence of overwhelming evidence introduced which rebutted the presumption of sanity.

(3) Improper denial of my request to hire a psychologist for evaluation after the State hired a psychologist to evaluate me over a year after the incident and over a year after I had been placed on medication.

(4) That the capital sentencing scheme in Alabama's death statute violates the eighth and fourteenth amendments and that statue, as applied to me, resulted in an unconstitutional sentence of death.

BILLY JOE MAGWOOD

STATE OF ALBAMA

COUNTY OF ESCAMBIA

BEFORE ME, a Notary Public, in and for said County and State, personally appeared BILLY JOE MAGWOOD, who being duly sworn, deposes and says:

That the allegations contained in the foregoing Affidavit are true and correct to the best of his information, knowledge and belief.

BILLY JOE MAGWOOD

SWORN TO and SUBSCRIBED before me on this 11th day of April, 1983.

NOTARY PUBLIC

MY COMMISSION EXPIRES: My Commission Expires 7/18/83

Office-Supreme Court, U.S.
FILED
MAY 24 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-6560

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

BILLY JOE MAGWOOD,

Petitioner

v.

STATE OF ALABAMA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI

TO THE ALABAMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

CHARLES A. GRADDICK
ALABAMA ATTORNEY GENERAL

EDWARD E. CARNES
ALABAMA ASSISTANT ATTORNEY GENERAL

LIAISON COUNSEL

250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

205/834-5150

QUESTIONS PRESENTED FOR REVIEW

1. Should this Court use its certiorari powers to review whether a state trial court properly applied settled law concerning pre-trial publicity to a particular set of facts?

2. Should this Court use its certiorari powers to review a sufficiency of the evidence issue involving insanity?

3. Does a criminal defendant examined by state paid psychiatrists have the right to be examined by an additional psychiatrist of his own choosing to be paid out of state funds?

4. Was the curative judicial construction performed on Alabama's 1975 capital punishment statute by the Alabama Supreme Court in Beck v. State, 396 So. 2d 645 (Ala. 1980), as a result of Beck v. Alabama, 447 U.S. 645 (1980), unconstitutional?

PARTIES

The caption contains the names of all the parties in the court below.

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OPINIONS BELOW

1. The opinion of the Alabama Court of Criminal Appeals affirming petitioner's conviction and death sentence is published as Magwood v. State, 426 So. 2d 918 (Ala. Cr. App. 1982).

2. The opinion of the Alabama Supreme Court affirming the Court of Criminal Appeals decision is published as Ex parte Magwood, 426 So. 2d 929 (Ala. 1983).

JURISDICTION

The decision of the Alabama Supreme Court that petitioner seeks to have this Court review was entered on January 7, 1983. A timely application for rehearing was denied on February 11, 1983. The petition was timely filed on April 12, 1983.

This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petition addresses issues involving the Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

This case stems from the fact that, "[o]n March 1, 1979, Billy Joe Magwood, the petitioner, shot and killed Coffee County Sheriff Neil Grantham." Ex parte Magwood, 426 So. 2d 929, 930 (Ala. 1983). Petitioner was indicted, tried, convicted, and sentenced to death in the Circuit Court of Coffee County, Alabama for the Code of Alabama 1975, §13-11-2(a)(5) capital offense of murdering a law enforcement officer on duty or because of some official or job-related act or performance of the officer. Magwood v. State, 426 So. 2d 918 (Ala. Cr. App. 1982); Ex parte Magwood, 426 So. 2d 929 (Ala. 1983).

The procedures used at petitioner's 1981 trial and sentence hearing were those promulgated by the Alabama Supreme Court in Beck v. State, 396 So. 2d 645 (Ala. 1980).

The testimony presented at trial is summarized and the legal proceedings more particularly detailed in Magwood v. State, 426 So. 2d at 920-921, and Ex parte Magwood, 426 So. 2d at 930-931.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

The petition for a writ of certiorari should be denied because the Alabama appellate courts correctly applied this Court's applicable decisions to each of the four issues raised in the petition. The first two issues involve abuse of discretion arguments peculiar to the facts of this case which are not of sufficient importance to merit certiorari review by this Court. The third and fourth issues are of wider significance but were correctly decided below.

I. THE PRE-TRIAL PUBLICITY QUESTION WAS PROPERLY DECIDED AND PRESENTS NO ISSUE WORTHY OF REVIEW BY CERTIORARI

The first question addressed in the petition concerns the pre-trial publicity issue. Pet. at 6-7. The Alabama Court of Criminal Appeals discussed that question in the following part of its opinion:

> Appellant asserts the trial court abused its discretion in refusing to grant his motion for a change of venue, based upon prejudicial pre-trial publicity. The record indicates a large amount of coverage was given to the sensational and notorious crime by television, radio, and the printed news media. However, the vast majority of the news accounts were strictly factual in nature and did not editorialize in such a manner as to inflame the community. Coon v. State, 380 So.2d 980 (Ala.Cr.App.1979), affirmed, 380 So.2d 990 (Ala.1980). Additionally, much of the coverage occurred at the time of the murder, or in the months immediately following the event, with relatively little coverage occurring at the time of the trial over two years later.
>
> The existence of widespread publicity in and of itself does not require a change of venue. Dolvin v. State, 391 So.2d 666 (Ala.Cr.App.1979), affirmed, 391 So.2d 677 (Ala.1980); Speigner v. State, 367 So.2d 590 (Ala.Cr.App.), cert.

denied, 367 So.2d 597 (Ala.1979). Without proof of actual prejudicial influence upon the jury, a trial court will not be found to have abused its discretion in refusing to grant a motion for a change of venue based upon pre-trial publicity. Dolvin, supra. We have reviewed the record carefully, scrutinizing both the media coverage itself, and its effect upon the jury venire as revealed by the voir dire examination of the prospective jurors. We note that any potential prejudicial effect of media coverage was diminished by the passage of time. Speigner, supra. The record contains no showing of actual prejudice such as would have rendered it reasonably unlikely that the appellant could secure a fair and impartial trial. Dolvin, supra. ...

Magwood v. State, 426 So. 2d 918, 923 (Ala. Cr. App. 1982).

The Court then quoted a representative sample of jury voir dire questions and answers, id., at 924, and concluded:

> Of the entire venire, one juror answered that he had a fixed opinion as to appellant's guilt or innocence. This juror was an employee of the Coffee County Sheriff's Department which had been involved in the investigation of the Sheriff's assassination, and he was excused from serving. None of the questions of appellant's counsel concerning prejudice as a result of publicity were answered in the affirmative. Two jurors expressed an opinion of possible partiality, but stated it was based upon their long-time friendship with Sheriff Grantham, not pre-trial publicity. Both jurors were excused. The burden is upon appellant to demonstrate the actual existence of a prejudicial opinion in the mind of the jurors which will raise a presumption of partiality. Speigner, supra. The introduction of news articles alone, without more, is not sufficient evidence to justify a change of venue; their prejudicial effect must be shown. Dolvin, supra at 674; Dial v. State, 387 So.2d 871 (Ala. Cr.App.1979), reversed on other grounds, 387 So.2d 879 (Ala.1980).
>
> The appellant in the instant case presented no evidence that the jurors were actually prejudiced against the appellant's case as a result of extensive publicity. Without such proof, this court could not find error in the trial court's refusal to grant a motion for change of venue. Dolvin, supra; Moberg v. State, 385 So.2d 74 (Ala.Cr.App.1980); Coon, supra.

Id., at 924-925.

The Alabama Supreme Court addressed the question in a similar fashion:

> The petitioner raises several points of error for our consideration. First, petitioner asserts that it was error for the trial court to deny his motion for change of venue based on prejudicial pre-trial publicity.
>
> Absent a showing of abuse of discretion, the ruling of the trial court on a motion for change of venue will not be disturbed. Speigner v. State, 367 So.2d 590 (Ala.Cr.App.1978), cert. denied, 367 So.2d 597 (Ala.1979). The defendant has the burden of showing that he will be unable to receive an impartial trial and an unbiased verdict at the present locale. Speigner, supra.
>
> Absent a showing of actual prejudicial influence upon the jury, the trial court was not in error in refusing to grant a motion for change of venue. Dolvin v. State, 391 So.2d 666 (Ala.Cr.App.1979), aff'd, 391 So.2d 677 (Ala.1980). The petitioner rests his assertion of bias on his impressions of public feeling at the time of the trial. Petitioner states in his brief, "Defendant's proof of such prejudicial influence was only displayed by the jury's verdict regarding his sanity." (Emphasis added.) Petitioner appears to contend that because the jurors found him to be sane they must have been prejudiced against him. This circuitous reasoning does not constitute a showing of actual prejudice as required by the case law.
>
> Our review of the voir dire examination of the jurors reveals no indication of possible bias. We agree with the Court of Criminal Appeals that the publicity surrounding the crime was strictly factual in nature and was not designed to inflame the community. Further, the trial took place two years after the crime. Even if we considered the publicity prejudicial, clearly the passage of time would diminish any prejudicial effect of the media coverage. See, Speigner, supra. Thus, the Court of Criminal Appeals did not err in holding that the denial of petitioner's motion for change of venue was not in error.

Ex parte Magwood, 426 So. 2d 929, 931 (Ala. 1983).

The rules of decision applied to this question by the Alabama appellate courts are entirely consistent with this Court's decisions holding that the constitutional test is

whether a juror can put aside any impressions based on pretrial publicity and render a fair verdict based on the evidence. E.g., Dobbert v. Florida, 432 U.S. 282, 303 (1977); Murphy v. Florida, 421 U.S. 794, 800 (1975); Irvin v. Dowd, 366 U.S. 717, 722-723 (1961). It is also well-established that the burden is on the defendant to show that one or more members of the jury panel could not do so. E.g., United States v. Garza, 664 F. 2d 135, 138 (7th Cir. 1981), cert. denied, 102 S. Ct. 1620 (1982); United States v. Provenzano, 620 F. 2d 985, 995 (3rd Cir. 1980).

Petitioner does not dispute the fact that the Alabama courts enunciated the correct principles of law. Instead, he simply contends that those controlling principles were applied in this particular case in a manner constituting an abuse of discretion. That does not state a substantial basis for grant of certiorari, because this Court does not sit to review the application of law to facts by the state courts.

II. THE QUESTION CONCERNING THE SUFFICIENCY OF THE EVIDENCE ON THE INSANITY ISSUE WAS PROPERLY DECIDED AND PRESENTS NO ISSUE WORTHY OF REVIEW BY CERTIORARI

On pp. 7 - 11 of his petition, the petitioner asks this Court to hold that the trial court abused its discretion in submitting the issue of petitioner's sanity to the jury. He made the same request of the Alabama Court of Criminal Appeals, which summarized the applicable law as follows:

> Appellant argues the jury's verdict was contrary to the law and the evidence presented, in that the jury should have returned a verdict of not guilty by reason of insanity.
>
> In reviewing the question of insanity, the court must apply the following general principles, enumerated in Herbert v. State, 357 So.2d 683 (Ala.Cr.App.), cert. denied, 357 So.2d 690 (Ala.1978):

"1. By statute, there is a presumption of sanity extending to all persons over the age of 14.

"2. The defense of insanity is an affirmative defense. The burden of proving this defense rests upon the defendant and never shifts to the state.

"3. The burden upon the defendant is to establish the issue of legal insanity by a preponderance of the evidence and to the reasonable satisfaction of the jury.

"4. The question of insanity at the time of the commission of the crime is a matter to be determined by the jury from a consideration of all the evidence.

"5. In making its determination, the jury may reject all expert testimony though it is without conflict.

"6. However, opinion testimony, even of experts must be weighed by the jury and may not be arbitrarily ignored."

However, where proof of insanity is both overwhelming and uncontradicted, the evidence of insanity may be so strong and undisputed that the jury should be so instructed, and a jury verdict to the contrary must be reversed. Christian v. State, 351 So.2d 623 (Ala.1977).

Magwood v. State, 426 So. 2d 918, 921-922 (Ala. Cr. App. 1982). The appeals court then carefully reviewed the conflicting psychiatric testimony presented by the two sides in this case, id., at 922-923, and concluded:

After consideration of all the testimony in this case, we do not find that the evidence of insanity was both overwhelming and uncontradicted. There was evidence presented which could have supported a reasonable inference that the homicide was an act committed by a man which the law would define as sane. Although conflicting evidence was presented by the expert witnesses who examined appellant, it is clear that the issue of whether appellant was sane or insane at the time of the offense was a question for the jury to decide. Nobis v. State, 401 So.2d 191 (Ala.Cr.App.), 401 So.2d 204 (Ala.1981). The evidence was simply not sufficient as a matter of law to overcome the presumption of sanity and to justify reversing the jury's verdict. Graham v. State, 383 So.2d 892 (Ala.Cr. App.), cert. denied, 383 So.2d 895 (Ala. 1980).

Id., at 923.

The Alabama Supreme Court reached the same conclusion in the matter:

> The second point of error raised by petitioner is that the lower court erred in submitting the case to the jury in light of the "overwhelming and uncontradicted" evidence introduced by defendant to rebut the presumption of sanity. This issue was addressed by this Court in Christian v. State, 351 So.2d 623 (Ala. 1977), wherein the Court established guidelines on the insanity defense. The Court reaffirmed the principle that the defendant is presumed sane and that the defendant has the burden of proof on the issue of insanity. The defendant must establish insanity by a preponderance of the evidence and the question is to be determined by the jury, except in cases where the evidence is "overwhelming and uncontradicted." Christian v. State, 351 So.2d at 624. See also, Lee v. State, 246 Ala. 343, 20 So.2d 471 (1945).
>
> In the case before us, the question of insanity was submitted to the jury, based upon conflicting testimony given by a series of four expert witnesses. Dr. Crook and Dr. Cooper, both practicing physicians, testified for the State that at the time of their examinations of the defendant in June of 1979 he was sane. Dr. Doug McKeown, a clinical psychologist who examined the petitioner in April of 1981, testified that in his opinion the defendant knew the difference between right and wrong on the day Sheriff Grantham was killed. Finally, the deposition of Dr. Rudder, a psychiatrist, was read at trial. In Dr. Rudder's opinion, Magwood was insane at the time of the killing.
>
> We cannot say that the evidence in this case was overwhelming and uncontradicted on the issue of petitioner's claim of insanity. The trial court was not in error in submitting the question to the jury.

Ex parte Magwood, 426 So. 2d 929, 931 (Ala. 1982).

The conclusion of the Alabama appellate courts on this question is correct. Extrapolating from Jackson v. Virginia, 443 U.S. 307 (1979), it simply cannot be said that no rational trier of fact could have found that petitioner failed to prove he was insane at the time of the crime, especially since three of the four expert witnesses who

testified on the subject testified that petitioner was sane at that time. More fundamentally, this Court's scarce certiorari resources should not be squandered in making the kind of abuse-of-discretion review that petitioner requests.

III. THE QUESTION CONCERNING DENIAL OF PETITIONER'S REQUEST TO HIRE AN ADDITIONAL PSYCHIATRIST OF HIS OWN CHOOSING WAS PROPERLY DECIDED AND PRESENTS NO SIGNIFICANT ISSUE

The third contention that petitioner raises is that the trial court abused its dicretion in failing to permit him to select a psychiatrist of his own choosing to be paid for by the state. Pet. at 11-14. The Alabama Court of Criminal Appeals addressed and rejected that contention for the following reasons:

> The trial court's failure to grant appellant's request for funds to hire a psychiatrist or psychologist of his own choosing is urged by appellant as reversible error. We do not agree. As has often been stated, a denial of funds to pay experts for investigations and the assistance of experts does not amount to a deprivation of constitutional rights. Thigpen v. State, 371 So.2d 385 (Ala.Cr. App.), cert. denied, 372 So.2d 387 (Ala. 1979); Brown v. State, 392 So.2d 1248 (Ala.Cr.App.1980), cert. denied, 392 So. 2d 1266 (Ala.1981); Johnson v. State, 335 So.2d 663 (Ala.Cr.App.), cert. denied, 335 So.2d 678 (Ala.1976), cert. denied, 429 U.S. 1026, 97 S.Ct. 649, 50 L.Ed.2d 629 (1976). This general rule applies equally to psychiatric experts and specialists. Nelson v. State, 405 So.2d 392 (Ala.Cr.App.1980), reversed on other grounds, 405 So.2d 401 (Ala.1981). Additionally, as indicated heretofore in this opinion, the trial court exhausted all available sources to assist appellant in presenting evidence in support of his insanity plea. Not one, but six experts examined appellant at the State's expense. Clark v. State, 56 Ala.App. 67, 318 So.2d 813 (1974), writ quashed, 294 Ala. 493, 318 So.2d 822 (1975), cert. denied, 423 U.S. 937, 96 S.Ct. 298, 46 L.Ed.2d 270 (1975). Three experts were independent, and three were State connected. Although a defendant may have some right to the appointment of an expert for preparation of his defense, there exists no constitutional right to

> have a private psychiatrist of the defendant's own choosing appointed at public expense. Willie Clisby, Jr. v. State, ___ So.2d ___ (Ala.Cr.App.1982), 6 Div. 576 [Ms. May 2, 1982]. The trial judge's actions appropriate protected appellant's rights in this regard.

Magwood v. State, 426 So. 2d 918, 925 (Ala. Cr. App. 1982) (emphasis added and deleted). The Alabama Supreme Court agreed. Ex parte Magwood, 426 So. 2d 929, 932 (1983).

An indigent criminal defendant is not entitled to appointment of a private psychiatrist of his own choosing to be paid out of state funds. E.g., Satterfield v. Zahradnick, 572 F. 2d 443, 445 (4th Cir.), cert. denied, 436 U.S. 920 (1978); Wilkins v. Maryland, 402 F. Supp. 76, 80-81 (D. Md. 1975), aff'd, 538 F. 2d 327 (4th Cir. 1976); Utsler v. Erickson, 315 F. Supp. 480, 482-483 (D. S.D. 1970), aff'd, 440 F. 2d 140 (8th Cir.), cert. denied, 404 U.S. 956 (1971); McGarty v. O'Brien, 188 F. 2d 151 (1st Cir. 1951), cert. denied, 341 U.S. 928 (1951). Unless this Court is willing to hold to the contrary, or is willing to hold that a criminal defendant is entitled to have more than six experts examine him, certiorari should not be granted on this question.

IV. THE QUESTION CONCERNING THE CONSTITUTIONAL PROPRIETY OF THE ALABAMA SUPREME COURT'S DECISON IN BECK v. STATE, 396 So. 2d 645 (Ala. 1980) (on remand), WAS CORRECTLY DECIDED BELOW

In Beck v. Alabama, 447 U.S. 625 (1980), this Court held that the preclusion clause contained in Alabama's 1975 capital punishment statute, Code of Alabama 1975, §13-11-2(a), could not constitutionally be applied in a death sentence case to prevent instructing a jury on a lesser included non-capital offense which was supported by the

evidence.[1] On remand, after briefing and oral argument, the Alabama Supreme Court issued an opinion severing the preclusion clause from the statute and promulgating new procedures to be used in future trials and retrials under the 1975 statute. Beck v. State, 396 So. 2d 645 (Ala. 1980). Petitioner's crime occurred before the decision in Beck v. State, supra, and he was tried afterwards in compliance with the procedures announced in that decision.

The petition raises the issue of whether petitioner's trial under the Beck v. State, supra, procedures violated his constitutional rights, particularly those arising under the Separation of Powers Clause. Pet. at 14. The issue was decided adversely to him below. Magwood v. State, 426 So. 2d 918, 928 (Ala. Cr. App. 1982).[2] The issue is squarely presented in this case, and it is not an insignificant one in terms of the number of cases affected. While no exact figures are available, there are approximately a dozen cases in which Alabama defendants committed capital murder before the December 19, 1980 date of the Alabama Supreme Court's decision in Beck v. State, supra, and were tried and sentenced to death afterwards under the procedures specified in that decision. The position of the State of Alabama is simply that the matter was correctly decided below.

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[1]Petitioner asserts that in Beck v. Alabama, supra, this Court found the 1975 statute "to be patently unconstitutional as a whole." Pet. at 14. The falsity of that assertion is established by Hopper v. Evans, 102 S. Ct. 2049 (1982), which upheld a pre-Beck capital conviction in a death sentence case, and by Alabama v. Evans, No. A-858 (U.S. April 22, 1983) (per curiam), which vacated a lower court stay and permitted the defendant in that same pre-Beck case to be executed.

[2]Petitioner did not raise the issue in his certiorari petition and brief to the Alabama Supreme Court, and consequently that court did not address it. See, Ex parte Magwood, 426 So. 2d 9292 (Ala. 1983). However, petitioner did belatedly raise that issue in the application for rehearing he filed in the Alabama Supreme Court, which was denied without opinion.

The Alabama Supreme Court recognized and addressed the separation of powers issue in the Beck v. State, supra, opinion itself:

> Under the separation of powers doctrine, this Court cannot change the offense, but a change in procedure to comport with constitutional requirements is not impermissible. In Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), the Supreme Court of the United States rejected an argument that a procedural change in the method of sentencing to conform to Furman requirements was ex-post facto. The legislature has adopted the sentencing scheme and has required jury participation. What we do is to adopt a rule whereby that scheme will comport with constitutional requirements.

396 So. 2d at 662 (majority opinion). Mr. Justice Adams, concurring specially, agreed:

> The key issue of the case, of course, is whether our Court can make these changes in Alabama's death penalty statute and escape the objection that we are invading the province of the legislature. Because I believe that the changes made by this Court are procedural and ameliorative, I feel that the changes mandated by the Court are well within constitutional parameters, and comport with the intent and purpose of the legislature in its enactment of the death penalty statute.

Id., at 666. The curative judicial construction the Alabama Supreme Court undertook in the Beck case in order to save the 1975 capital punishment statute was not unprecedented. The same court had previously engaged in curative judicial construction to save Alabama's obscenity statute, Pierce v. State, 292 Ala. 473, 475, 296 So. 2d 218 (1974), cert. denied, 419 U.S. 1130 (1975), and to save Alabama's statute for the legitimation of illegitimate children, Everage v. Gibson, 372 So. 2d 829, 832-834 (Ala. 1979).

To the extent that Appellant's separation of powers argument purports to have a federal constitutional basis, it fails outright, because "[t]he principle of separation of powers is not enforceable against the states as a matter of

federal constitutional law." E.g., Attwell v. Nichols, 608 F. 2d 228, 230 (5th Cir. 1979); see e.g., Rose v. Hodges, 423 U.S. 19, 22 (1975).

Both Jurek v. Texas, 428 U.S. 262 (1976), and Proffitt v. Florida, 428 U.S. 242 (1976), establish the federal constitutional propriety of state judicial action to conform capital punishment statutes to constitutional requirements. As the opinion in Lockett v. Ohio, 438 U.S. 586, 606-607 (1978), noted, the crucial difference between the Ohio statute which was struck down in that case and the statutes which had been upheld in Proffitt and Jurek was that the Florida and Texas courts had construed the statutes of those states to conform to the constitutional requirement that all relevant mitigating circumstances be considered. In addition, appellate review of sentencing, which was essential to the constitutionality of the Florida statute, see, Gardner v. Florida, 430 U.S. 349, 361 (1977), was read into that statute by the Florida Supreme Court. Proffitt v. Florida, 428 U.S. at 250-251.

Two recent federal appeals court decisions also strongly support the federal constitutional propriety of the Alabama Supreme Court's decision in Beck v. State, supra. In Knapp v. Cardwell, 667 F. 2d 1253 (9th Cir.), cert. denied, 51 U.S.L.W. 3420 (Nov. 30, 1982), a group of Arizona death row prisoners filed a class action lawsuit challenging the propriety of the Arizona Supreme Court's decision in State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924 (1979). In Watson the Arizona Supreme Court had reacted to Lockett v. Ohio, 438 U.S. 586 (1978), by severing some offending language from the Arizona capital punishment statute and then judicially construing the statute to meet the newly enunciated constitutional standards.

The inmate plaintiffs in Knapp v. Cardwell, supra, charged that the Arizona Supreme Court's curative judicial

construction violated the Eighth and Fourteenth Amendments, the Double Jeopardy Clause, the Ex Post Facto Clause, and the Article IV, Section 4 guarantee of a republican form of government. The Ninth Circuit rejected all those claims and held, in essence, that a state court's interpretation of a state statute does not implicate the Federal Constitution and is in effect, none of a federal court's business. 667 F.2d at 1260.

The other recent federal appeals court decision on the issue is Jordan v. Watkins, 681 F. 2d 1067 (5th Cir. 1982), which involved the Mississippi Supreme Court's decision in Jackson v. State, 337 So. 2d 1242 (Miss. 1976). In Jackson the Mississippi Supreme Court rewrote that state's capital punishment statute to conform with the 1976 Supreme Court decisions prohibiting mandatory death penalties. Jordan v. Watkins, 681 F.2d at 1077-1078. The Fifth Circuit in Jordan upheld Mississippi's Jackson decision against federal constitutional attack. Jordan v. Watkins, 681 F.2d at 1079-1080. Since the Mississippi Supreme Court's curative judicial construction in Jackson was far more extensive than the Alabama Supreme Court's action in Beck v. State, supra, the Jordan decision is strong authority for the constitutional propriety of the Beck decision.

Finally, this Court itself has repeatedly held that the interpretation of state statutory provisions and the question about what happens to the remainder of a state statute when part of it is declared unconstitutional are state law questions to be decided by the highest court of the state. E.g., Ward v. Illinois, 431 U.S. 767, 772 (1972); Morey v. Doud, 354 U.S. 457, 470 n. 16 (1957). See, Smith v. Phillips, 102 S. Ct. 940, 948 ("Federal courts have no supervisory authority over state judicial proceedings..."). The Alabama Supreme Court has decided those state law

questions and this Court should not interfere with its decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Edward E. Carnes, a member of the Bar of the Supreme Court of the United States, do hereby certify that I did serve a copy of this brief on petitioner by placing a copy in the United States mail, postage prepaid, and properly addressed to his counsel of record as follows:

Hon. J. L. Chestnut, Jr.
Chestnut, Sanders, Sanders & Turner
P. O. Box 1305
Selma, Alabama 36701

I further certify that I have served all parties required to be served.

Done this 19th day of May, 1983.

Ed Carnes

EDWARD E. CARNES
ALABAMA ASSISTANT ATTORNEY GENERAL